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IN THE

Supreme Court of the United States

October Term, 1953.

No. 504.

ALEXIS I. duPONT BAYARD,
ERWIN M. BUDNER,
STANLEY ROSS,
STAR PUBLISHING COMPANY, a
Corporation of the State of Delaware,
Petitioners,

against

JOSEPH H. MARTIN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE.

Petitioner prays that a Writ of Certiorari issue to review the decision of the Supreme Court of the State of Delaware [1] dated December 1, 1953, on which a mandate was entered January 13, 1954.

OPINIONS BELOW.

The opinion of the Court of Chancery (R. 140) is reported at 98 A. (2d) 780. The opinion of the Supreme Court (R. 160) is reported at 101 A. (2d) 329.

1. The Supreme Court, the Superior Court, and the Court of Chancery of the State of Delaware are referred to herein respectively as Supreme Court, Superior Court, and Court of Chancery or Chancery.

JURISDICTION.

The opinion of the Supreme Court was filed on December 1, 1953 (R. 160). The order directing entry of a mandate affirming the Court of Chancery's decision was entered January 13, 1954 but its issuance was stayed pending petition for a Writ of Certiorari in this Court (R. 144). The jurisdiction of this Court is invoked under 28 *U. S. C.* § 1257(3).

No issue under the Fourteenth Amendment of the Constitution of the United States was raised in the Court of Chancery, the court of first instance, because the motion for preliminary injunction in that court was believed by counsel to be addressed to the court's discretion to prevent irreparable injury to the moving parties under the prior decisions of that court in *Allied Chemical & Dye Corp. v. Steel & Tube Co.*, 14 Del. Ch. 117, 122 A. 142 (1923) and in *Sandler v. Schenley Industries, Inc., et al.*, 79 A. (2d) 606 (1951). The Court of Chancery treated this motion in accordance with counsel's understanding of its nature. *Bayard, et al. v. Martin, et al.*, (R. 140) 98 A. (2d) 780. The Court of Chancery made no findings of fact or conclusions of law relating to the status of the corporate petitioner in the questioned judgments and did not determine its legal relation to Respondent's alleged principal obligors.

On appeal to the Supreme Court the error urged was the Vice-Chancellor's abuse of discretion in denying the preliminary injunction by failing to apply the principles of *Sandler v. Schenley Industries, Inc., et al., supra; Allied Chemical & Dye Corp. v. Steel & Tube Co., supra.* The Supreme Court in its opinion dated December 1, 1953 *for the first time* injects the corporate petitioner's status as alleged principal obligor and its relation to Respondent as more than a "mere accommodation indorser" as the primary legal basis for affirming the Chancery Court ruling, *Bayard v. Martin*, 101 A. (2d) 329 (1953). This conclusion of law by the Supreme Court is based on findings of fact completely unsupported by the

record evidence and results from the application of legal principles not properly applicable to the facts disclosed in the record evidence.

The Supreme Court modified the basis for issuance of a preliminary injunction as previously set forth in *Sandler v. Schenley Industries, Inc., et al., supra,* and found facts and applied legal principles not applied in the Court of Chancery and without justification in the record evidence. These new elements injected by the Supreme Court which had not been urged in the court below by either party or relied upon by the court below in reaching its decision were pointed out for the first time and raised in Petitioners' petition for reargument (R. 171). The same objections to the court's decision were pointed out and raised in Petitioners' motions for a special mandate, their proposed form of special mandate and in their petition for leave to file an amended petition for reargument (R. 181-186). All of these matters were presented to the Supreme Court as denials of "due process of law" under the Fourteenth Amendment of the Constitution of the United States and were determined adversely to Petitioners in the denial of Petitioners' petition for reargument and motions for a special mandate (R. 192).

Petitioners could not anticipate that the Supreme Court would depart from the Court of Chancery's previous decisions beginning with *Allied Chemical & Dye Corp. v. Steel & Tube Co., supra,* and most recently affirmed in *Sandler v. Schenley Industries, Inc., et al., supra,* without purporting to overrule these decisions. Petitioners, likewise, had no reason to anticipate that the Supreme Court would find facts and apply legal principles completely departing from the previous holding of the Superior Court (R. 157, 158) which it purports to adopt here and reach a legal conclusion unsupported in the record evidence as the basis for affirming this decision of the court below when neither had been urged in nor considered by that court in reaching its conclusions and decision.

These denials to Petitioners of constitutional "due process of law" by the Supreme Court's determination of facts not supported by the record evidence were raised at the earliest possible opportunity because they could not have been known or anticipated by the Petitioners prior to the Supreme Court's decision filed December 1, 1953.

QUESTION PRESENTED.

I. Does the Supreme Court's finding of facts necessary to its decision, completely unsupported in and contradicted by the record evidence, amount to a denial of "due process of law" under the Fourteenth Amendment of the Constitution of the United States?

STATEMENT.

On October 3, 1946, Respondent, Joseph H. Martin (hereafter Martin), Petitioner, Star Publishing Company (hereafter Star), and J. Edwin Carter (hereafter Carter), executed a contract transferring all Star's outstanding stock from Martin to Carter for $140,500 (R. 92-94). At settlement on November 15, 1946 Carter paid Martin $35,000 and made Star joint maker on twenty-one judgment notes maturing serially and payable to Martin in the total sum of $105,500 for the balance (R. 94). Carter also signed these notes as his personal obligations (R. 67, 68). Martin confessed judgments on these notes against Carter and Star January 17, 1947 (R. 6). Carter defaulted on the August, 1949 installment; Star was bankrupt, at least in the equity sense, and Martin sought a substitute for Carter (R. 73, 74).

On October 12, 1949, Martin made an agreement with Petitioner, Stanley Ross (hereafter Ross) (R. 105). Martin released Carter from any unpaid judgments confessed on the notes given pursuant to the October 3, 1946 agreement (R. 106-108). Ross executed judgment notes payable to Martin which were identical in number and individual

amount to the unpaid judgments confessed January 17, 1947 from which Martin released Carter, *but not Star* (R. 105). Martin also released Carter from all liability under the October 3, 1946 agreement (R. 106-108). Carter transferred to Ross 87½% of Star's stock which Martin had sold to Carter by the October, 1946 contract.

Ross paid the August 1949 installment due from Carter before signing the October, 1949 agreement with Martin to prevent Star's bankruptcy (R. 19). Martin received his 1950 installments and one in February, 1951 while Star's new owners diligently examined its incomplete books and records trying to reorganize (R. 162). These extended examinations uncovered Martin's misrepresentations substantially reducing the value of Star's assets and its stock. All installment payments stopped (R. 162). On March 24, 1952, Martin issued executions on his judgments securing the August, 1951 and February, 1952 installments (R. 162). On March 31, 1952, Star filed motions in Nos. 492 and 493 January Term, 1947 in Superior Court seeking to open or, in the alternative, to vacate Martin's twenty-one judgments against Star for fraud and failure of consideration (R. 190-198).

On April 18, 1952, Martin commenced Civil Action No. 320—1952 in Superior Court against Petitioners Alexis I. duPont Bayard (hereafter Bayard), Erwin M. Budner (hereafter Budner), and Star for alleged breaches of the October, 1946 and October, 1949 contracts. Martin seeks recovery of the identical sums already reduced to judgments against Star by confession of the judgment notes executed as collateral security pursuant to the October, 1946 agreement (R. 85-92). Martin claims an additional $10,000 in tax refunds to Star allegedly due him under the October, 1946 agreement. Petitioners moved to dismiss Martin's complaint for its failure to state a cause of action (R. 85-92).

Star's motion to open or vacate these judgments and Martin's motion to dismiss were argued before the Honor-

able Caleb R. Layton, 3rd (hereafter Judge Layton), in Superior Court October 16, 1952. On November 5, 1952, Judge Layton denied Star's motion because he found no evidence of fraud or failure of consideration in the 1946 transaction (R. 147-151). On November 11, 1953, Judge Layton entered orders denying Star's motion to open or vacate these judgments, denying reargument on Star's motion, and denying stay of execution both pending appeal and until final judgment in Civil Action No. 320—1952 (R. 9). Star appealed to the Supreme Court, also obtaining a stay of execution pending appeal. *Star Pub. Co. v. Martin,* 95 A. (2d) 835, 836 (1953).

Petitioners' motion to dismiss Respondent's complaint in Civil Action No. 320—1952 was argued October 8, 1952. Judge Layton denied Petitioner's motion to dismiss Civil Action No. 320—1952 on June 11, 1952 (R. 153-160).

After its appeal to the Supreme Court in Nos. 492 and 493 January Term, 1947, Star moved to remand without decision to have certain newly discovered evidence admitted in Superior Court in support of its motion to open, vacate, or stay execution on these judgments. On March 5, 1953, the Supreme Court denied Star's motion because the newly discovered evidence related to 1949 transactions whereas its motion attacked 1946 judgments. *Star Pub. Co. v. Martin,* 95 A. (2d) 465, 470 (1953). But Star never argued that the 1949 transactions influenced the 1946 judgments, and the Supreme Court recognized this fact in its decision March 26, 1953, affirming Superior Court's denial of Star's motion to open or vacate these judgments. *Star Pub. Co. v. Martin, supra,* 835, 838, 839.

On April 6, 1953, Star filed a petition for reargument in the Supreme Court addressed to its opinion of March 26, 1953, affirming Superior Court's order of November 11, 1952, denying Star's motion to open or vacate these judgments. On April 6, 1953, Star also filed a motion for a special mandate from the Supreme Court directing Superior

Court to restrain execution on these judgments until final determination of Civil Action No. 320—1952 (R. 131, 132).

On April 7, 1953, Petitioners filed a complaint in Chancery and moved for a temporary restraining order and preliminary injunction enjoining Martin from executing on these collateral security judgments in Superior Court pending determination of Civil Action No. 320—1952 (R. 5-10). On April 8, 1953, Chancery granted Petitioners' motion for a temporary restraining order and fixed a hearing for a preliminary injunction (R. 10-13).

The Supreme Court denied Star's motion for a special mandate April 16, 1953 on the ground that it had no jurisdiction to direct Superior Court to enter an injunctive order because Superior Court lacked jurisdiction to issue injunctive process (R. 131, 132).

On July 22, 1953, Chancery entered an order denying Petitioners' motion for a preliminary injunction but continuing the effect of the April 8, 1953 temporary restraining order pending appeal to Supreme Court (R. 144, 145). Petitioners appealed to the Supreme Court; that Court affirmed Chancery's order on December 1, 1953 (R. 160-171). The Supreme Court stayed the mandate on its opinion pending petition for a Writ of Certiorari in this court (R. 192, 193).

REASONS FOR GRANTING THE WRIT.

1. Petitioners' status is legally and factually clear. Carter and Martin intended the judgments entered against Star in 1946 as collateral security for Carter's debt to Martin (R. 22, 23, 68, 93, 94, 106-108, 157, 158). Martin confessed these judgment notes before maturity with voluntary stay of execution until maturity (R. 158). This practice is a security device with long-standing, general acceptance in Delaware. *2 Woolley, Delaware Practice* (1906, § 954(b).[2] In 1949 Martin released Carter from this 1946 obligation and accepted Ross as Carter's substitute (R.

2. *2 Woolley on Delaware Practice* § 954(b) Pages 661-662, Appendix, *infra,* Page 19.

106-108). The 1946 Carter obligations no longer exist; these collateral judgments can no longer secure them.

Each judgment note recites that it is subject to the terms and conditions of the October, 1946 agreement. The October, 1949 agreement between Ross and Martin recites that Ross assumes Carter's obligations of the October, 1946 agreement (R. 105-106). Star (still controlled by Carter) consented to Carter's release in this 1949 novation (R. 108). Without Star's consent to Carter's release as principal, his release, by operation of law, released Star, the collateral security judgment debtor. *Sussex Finance Co. v. Goslee,* 82 A. (2d) 743 (1951); *W. T. Rawleigh Co. v. Warrington,* 199 A. 666 (1938); 72 *C. J. S. Principal and Surety,* § 223. All relevant record evidence conclusively establishes the parties' intention that Star's property be security for Carter's personal obligation (R. 22, 23, 68, 93, 94, 108, 153, 157, 158). These collateral judgments now secure the 1949 Ross obligation, whatever its amount.

But fraud taints this 1949 novation producing Ross' alleged damages which exceed the face amount of Ross' alleged contract obligation to Martin. *Bayard v. Martin, supra;* 329, 332. *Both obligations result from the 1949 novation. Neither Martin's contract claim nor Ross' fraud claim is reduced to judgment, only Star's collateral security judgments are entered.*

All payments stop. Martin demands that the individual Petitioners, against whom no judgments exist, pay these judgments without opportunity to finally determine their counterclaims against Martin, establish an off-setting counterclaim and prevent execution against Star on these collateral security judgments. The individual Petitioners refuse payment (R. 132-136). Martin issues execution against Star on these collateral security judgments to compel payment. Star moves to open, vacate or stay execution on these judgments pending determination of the balance and direction of obligation between Ross and Martin resulting from the 1949 novation. Martin files a separate ac-

tion to accelerate all future installments. Ross answers Martin's action with his counterclaim for Martin's fraud. Martin joins issue on Ross' counterclaim (R. 161, 162). *Bayard v. Martin supra,* 329, 331, 332.

The Superior Court denies Star's motion to open, vacate or stay execution on these judgments because there was no fraud in 1946, but holds that Martin and Carter intended these judgments as collateral security for the balance of the purchase price under the 1946 agreement (R. 147-160). Star appeals to the Supreme Court and then files a motion to remand without decision for newly discovered evidence. The Supreme Court refuses remand because the newly discovered evidence relates to the 1949 novation, not the 1946 agreement. *Star Pub. Co. v. Martin, supra,* 465, 470 (March 5, 1953). Next, Supreme Court affirms Superior Court's refusal to open or vacate these collateral security judgments because Star received consideration and there was no fraud relating to the 1946 agreement, and Star was not the proper party to redress 1949 fraud. *Star Pub. Co. v. Martin, supra,* 835, 838, 839 (March 26, 1953).

The Supreme Court concedes that Star primarily attacked the 1949 novation. The Supreme Court treats Star as "co-debtor" with both Carter and Ross on the principal obligation, denying Star's status as collateral security judgment debtor for Carter established in 1946, extinguished in 1949, renewed with Ross as principal obligor in 1949, and recognized by a Superior Court decision which Supreme Court says it adopts in determining Star's status. The Supreme Court also distinguishes a "substitution of obligors" from the classic novation. *Star Pub. Co. v. Martin, supra,* 835, 836 (R. 162). The Supreme Court purports to accept Judge Layton's finding that Star received valid consideration in the 1946 agreement and concludes therefrom that Star cannot be a "mere accommodation indorser" in the 1949 novation. *Star Pub. Co. v. Martin, supra,* 835.

But Star never claimed to be a "mere accommodation indorser". Star argued and Judge Layton concluded that *the parties intended these judgments as collateral security* in denying Star's motion to open, vacate or stay execution on them (R. 147-152). Later Judge Layton reaffirms his conclusion that the parties intended these judgments as collateral security in denying Petitioners' motion to dismiss Civil Action No. 320—1952 (R. 157, 158). *Judge Layton did not consider the 1949 novation* in denying Star's motion to open, vacate or stay execution on these collateral security judgments (R. 147-152). Judge Layton reviews the 1946 transaction alone and recognizes that 1946 fraud would require opening these judgments or staying their execution because they were merely collateral security (R. 149, 150). Since he found no 1946 fraud and *did not consider the 1949 novation,* he denied Star's motion (R. 147-152). Star's primary reason for appealing Judge Layton's decision was his failure to consider the 1949 novation and stay execution on these judgments pending final determination of Civil Action No. 320—1952. *Star Pub. Co. v. Martin, supra,* 465, 470.

Thus, the Supreme Court characterizes the 1949 novation using *only some* of the facts applicable to the 1946 agreement *alone,* and alters Judge Layton's basic conclusion of law, which it purports to adopt, that *the parties intended these judgments as collateral security* (R. 157, 158, 169). Another reargument petition and motion for a special mandate sought a direction that Superior Court stay execution on these judgments pending determination of Civil Action No. 320—1952 because earlier execution would prematurely determine the balance and direction of payment required by the 1949 novation. The Supreme Court denied this petition and motion because it required exercise of an equity power and exceeded Superior Court's jurisdiction (R. 131, 132).

Previously a collateral security judgment debtor was the proper party to prevent premature or otherwise improper execution. *2 Woolley, Delaware Practice* § 954(b).

Superior Court Civil Rules 60(b)(5) and (6) [3] enlarge Superior Court's inherent equity power to control its process. Here, Supreme Court destroys a collateral security judgment debtor's classic right to protection through stay of execution, and refuses application of *Superior Court Civil Rules* 60(b)(5) and (6) (R. 131, 132). The law court has no remedy for Star.

The individual Petitioners have no remedy at law because Martin's judgments are final, independent judgments (R. 6) and intervention is impossible. *Superior Court Civil Rule* 24.[4] Even if the individual Petitioners reduce their counterclaims to judgment in Civil Action No. 320—1952, they cannot off-set them against Martin's judgments (R. 6). Any judgments for the individual Petitioners in Civil Action No. 320—1952 are likewise final and independent of Martin's judgments. Thus, a battle of executions must ensue unless equity intervenes. The individual Petitioners, therefore, filed a Chancery action to enjoin execution on these judgments pending final determination of Civil Action No. 320—1952 and incidentally a determination of the individual Petitioners' damages resulting from Martin's fraud in 1949 (R. 5-10).

Burton v. Willin, 6 Houston 522 (1883) holds that equity must enjoin execution on a law judgment where loss of a proper set-off will otherwise result. *Superior Court Civil Rule* 13(a) [5] makes the individual Petitioners' counterclaims mandatory. *Staats v. Herbert*, 4 Del. Ch. 508, 516 (1872) requires equity to enjoin execution on a law judgment in excess of the parties' intentions and specified purpose. Chancery also has jurisdiction to enjoin contemplated action where the "balance of equities" relat-

3. 13 Del. C. Ann. (1953) Page 433, Appendix, *infra*, Page 18.

4. 13 Del. C. Ann. (1953) Pages 336, 337, Appendix, *infra*, Page 17.

5. 13 Del. C. Ann. (1953) Page 316, Appendix, *infra*, Page 17.

ing to plaintiff's "probable success" on final hearing and danger of "irreparable injury" show a net with plaintiff. *Bayard v. Martin, supra*, 835. Chancery treated this case like a stockholders' dispute, and, absent undisputed facts substantially determining legal status, denied an injunction at this preliminary stage. *Bayard et al. v. Martin et al.*, 98 A. (2d) 780 (1953). See *e.g. Allied Chemical & Dye Corp. v. Steel & Tube Co., supra; Sandler v. Schenley Industries, Inc., et al., supra.* The Chancery Court ignored Star's position as a collateral security judgment debtor and the applicability of *Burton v. Willin, supra, Staats v. Herbert, supra*, and Petitioners' inadequate legal remedy.

Petitioners appealed to the Supreme Court. Supreme Court, like the Chancery Court, rejects Martin's fraud as a proper consideration, but only because that issue will not be tried in Chancery, and Star is more than a "mere accommodation indorser". *Bayard v. Martin, supra*, 329, 335, 336 (R. 160-169).

In this opinion, *Bayard v. Martin, supra*, 329, 335 the Supreme Court recognizes that Petitioners must rely primarily on Star's status as a collateral security judgment debtor. All alleged principal obligors and the collateral security judgment debtor are parties. The court squarely faces Star's status. Judge Layton has already held that the parties intended these judgments as collateral security (R. 157, 158) and, therefore, their entry did not merge the principal obligation secured by this collateral as to Star or Carter in 1946 (R. 158). Since Ross replaced Carter on the unmerged principal obligations, these Ross obligations still exist independent of these collateral security judgments and support Martin's action against Petitioners in Civil Action No. 320—1952 (R. 157-160).

The Supreme Court again characterizes Star as "co-debtor" and as more than a "mere accommodation indorser" in the 1949 novation because Judge Layton found "valuable consideration" in the 1946 agreement. *Bayard v. Martin, supra*, 329, 335, 336. Again the court ignores

Judge Layton's clear and required characterization of these judgments as collateral security and his consistent subsequent ruling denying that the principal obligations of the 1946 agreement are merged in these judgments (R. 18, 23, 67, 68, 93, 94, 106-108, 157, 158).

2. Although the Supreme Court ignores the relevant facts and necessary legal conclusions, its errors become more serious when applied in conjunction with its previous decision limiting Superior Court's power to control execution on these same judgments. The Supreme Court held that Superior Court, where these judgments are entered, is powerless to stay their execution either pursuant to its inherent common law powers or under *Superior Court Civil Rules* 60(b)(5) and (6); Superior Court is a court of law and its staying execution amounts to issuance of an injunction. The Supreme Court also concludes that it is unable to determine the meaning or purpose of *Superior Court Civil Rules* 60(b)(5) and (6) and in any event, whatever their purpose, it is impossible for court rules to enlarge jurisdiction. *Star Pub. Co. v. Martin, supra,* 835, 839 (R. 131, 132).

While the Supreme Court correctly limits Superior Court's power to enlarge its jurisdiction by promulgating its rules, the court's reasoning ignores the long-established inherent equity power of a law court to control its process. The Superior Court recognized in *Blaustein v. Standard Oil Co.*, 45 A. (2d) 533, 536 (1945), that it controlled its process sufficiently to stay a self-executing order dissolving a foreign attachment of corporate stock to protect appellate jurisdiction—a clear exercise of inherent equity power preventing an unjust consequence otherwise resulting from operation of law. The *Blaustein* opinion concedes that an order dissolving attachment is a self-executing one, which, without a stay provision, destroys the Supreme Court's appellate jurisdiction. *Blaustein v. Standard Oil Co., supra,* 533, 536.

Superior Court Civil Rules 60(b)(5) and (6) applied to this case require a stay of execution on these collateral security judgments until Martin's claim and Petitioners' mandatory counterclaims are tried in Civil Action No. 320—1952, preventing premature payment to Martin before the ultimate balance and direction of liability becomes conclusive. If Superior Court thus controls its process, it exercises its classic common law jurisdiction to prevent abuse of its process; no extension of jurisdiction is required. *Blaustein v. Standard Oil Co., supra,* 533, 536. If Superior Court lacks jurisdiction to stay execution on its judgments for this purpose, *Star Pub. Co. v. Martin, supra,* 835, and Chancery cannot enjoin execution on a law judgment contrary to its expressly intended purpose, *Bayard v. Martin, supra,* 329, then a collateral security judgment freezes the amount of the principal obligation it secures.

This conclusion ignores *Staats v. Herbert, supra,* enjoining execution on a law judgment beyond its intended purpose. These decisions further ignore *Burton v. Willin, supra,* requiring Chancery to enjoin execution on a law judgment to permit establishment of an equitable set-off reducing the balance of the law judgment. The Supreme Court likewise ignores *Blaustein v. Standard Oil Co., supra,* 533, 536 and its premise that "The power of the Court is a power to grant the stay in furtherance of justice, *regardless of the nature of the order stayed.*"

The Supreme Court decisions throughout this litigation ignore the basic purpose of modern procedural rules, and deny Petitioners "due process of law" under the Fourteenth Amendment of the Constitution of the United States. These decisions furnish a firm foundation for complete destruction of the modern procedural rules adopted for both Superior Court and Chancery. If Superior Court cannot compel determination of this *whole controversy* before Martin destroys all possibility of substantial justice through executions on these collateral security judgments and Chancery is equally powerless, then Delaware procedural law functions in a vacuum, its general utility to pro-

mote substantial justice vanishes, and installment sales secured by collateral judgments become a menace to the purchasing public.

Minimum standards of constitutional procedural "due process of law" require that one Delaware court stay execution on these collateral security judgments pending final determination of Petitioners' counterclaims. If Superior Court cannot provide this remedy, *Bayard v. Martin, supra,* 835, Chancery must. To permit their earlier enforcement through executions is to violate Petitioners' rights to "due process of law". Supreme Court characterization of the individual Petitioners' legal status in the 1949 novation, unsupported in the record evidence, cannot obscure this violation. The record evidence supports characterizing these judgments as collateral security; the *record evidence offers no alternative possibility.* The Fourteenth Amendment of the Constitution of the United States and its guarantee of "due process of law" require that the Supreme Court *act only on facts supported in the record. Craig v. Harney,* 331 U. S. 367, 373-4 (1947); *Sterling v. Constantin,* 287 U. S. 378, 398 (1932); *Fiske v. Kansas,* 274 U. S. 380, 385, 386 (1926); *Creswill v. Grand Lodge,* 225 U. S. 246, 261 (1912); *Kansas City Southern Railway Company v. C. H. Albers Commission Company,* 223 U. S. 473 (1912). If so, Supreme Court must direct Chancery to preserve the status quo pending final determination of the direction and the amount of ultimate liability resulting from the 1949 novation in the pending Superior Court Civil Action No. 320—1952.

CONCLUSION.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX.

13 Delaware Code Annotated (1953).

SUPERIOR COURT CIVIL RULE 13(a).

"(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim, which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action."

SUPERIOR COURT CIVIL RULE 24.

"(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody of, or subject to the control or disposition of the court or an officer thereof.

"(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

"(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefore and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene."

SUPERIOR COURT CIVIL RULE 60(b).

"(b) Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant any relief provided by statute, or to set aside a judgment for fraud upon the court, or to deal with judgments by confession as provided by law. Writs of coram nobis, coram vobis, and audita querela are abolished, and the procedure for obtaining relief from judgments shall be by motion as prescribed in these rules or by an independent action."

SECTION 954(b), 2 WOOLLEY ON DELAWARE PRACTICE (1906).

"Judgment Must Be Due. It is not unusual to enter judgments by confession, providing for the payment of the debt at some future period. The entry of judgment with the amount payable at a future date is quite a customary way of making and securing loans. Therefore when a judgment is so entered, execution cannot properly be issued until the judgment is due and payable. If, however, execution be issued before the debt secured by the judgment becomes due and payable, the execution can be avoided only by the defendant. If the defendant see proper not to resist the execution, the court will permit the execution to stand, and will not allow other creditors to attack it collaterally.[2]

"Judgments entered upon bonds and warrants of attorney are entered for the penalty, and while the real debt is indorsed upon the writ, the execution follows the judgment,[3] and is issued for the penalty. Where the condition is not for the payment of money, but for the performance of some collateral undertaking the judgment is entered for the penalty and becomes due upon the breach of the condition. The execution likewise follows the judgment and the creditor proceeds at his peril, subject to the interference of the Court of Chancery, if he take execution before a breach has been committed, or, after a breach, for a larger sum than the damages actually sustained.[4] The Court of Chancery will, in a proper case, restrain such an execution, direct an issue of *quantum damnificatus,* and when the damages are ascertained upon the trial of the issue, grant relief upon the payment of such damages."[1]

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2. Unreported case, heard 1890, N. C. Co.

3. Bradley v. Reed, 1 Harr. 33 (34).

4. Staats v. Herbert, 4 Del. Ch. 508, (517-519): State v. Whitaker, 2 Harr. 137.

1. Staats v. Herbert, 4 Del. Ch., 508.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 604

ALEXIS I. DUPONT BAYARD, ERWIN M. BUDNER, STANLEY ROSS, STAR PUBLISHING COMPANY, a Corporation of the State of Delaware, *Petitioners,*

v.

JOSEPH H. MARTIN, *Respondent.*

On Petition for Writ of Certiorari to the Supreme Court of the State of Delaware

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Chancery of Delaware, New Castle County (R. 140), is reported in 98 A. 2d 780. The opinion of the Supreme Court of Delaware (R. 160) is reported in 101 A. 2d 329.

Opinion of the Supreme Court of Delaware was filed December 1, 1953 (R. 160). Petition for rehearing filed

December 11, 1953 (R. 171) was denied December 21, 1953 (R. 178).

JURISDICTION

Order of the Supreme Court of Delaware directing entry of mandate in the form "customarily entered in causes in which the judgment of the lower court is affirmed" was entered on January 13, 1954[1] (R. 192).

Petition for certiorari was filed February 26, 1954. The jurisdiction of this court is invoked under 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED

1. Whether mere alleged error of the Supreme Court of a state in deciding a case violates the due process or equal protection clauses of the Fourteenth Amendment of the Constitution.

2. Whether an order of a state supreme court is based on a non-federal ground adequate to support it where its affirmance of denial of temporary injunction is on the ground that the applicants have adequate remedy at law.

3. Whether a federal question claimed first to have arisen on decision of a state supreme court is timely raised when first urged, not in Petition for Re-argument, but thereafter in a Motion for Leave to File an Amended Petition for Rehearing.

STATEMENT

In brief substance, the facts are as follows:

Original Contract Between Martin, Carter and Star.

By agreement of October 3, 1946 signed by Martin, Carter and Star Publishing Company (hereinafter called "Star") (R. 92-101) Martin, sole stockholder of Star,

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[1] The same order (R. 192) also:

1. Denied the motion of petitioners for Leave to File Amended Form of Petition for Reargument, or in the alternative to have the motion itself treated as amended petition for reargument.
2. Denied motion of petitioners for special form of mandate.
3. Stayed issuance of mandate pending petition for certiorari.

entered into contract to sell all of his stock to Carter for $145,500.00, payable $10,000.00 on execution, $25,000.00 on settlement and the balance in a series of twenty-one installments maturing over a period of years (R. 94). It was further provided that to secure the unpaid balance Carter and the Star should on the settlement execute a judgment note in the amount of each installment payable on the due date thereof (R. 94).

Martin agreed to:

1. Transfer from his own name to the Star designated real property (R. 97-98).

2. Satisfy the Star's note for $8,000.00 held by him (R. 100).

3. Refrain from competition with the Star in the newspaper business for ten years (R. 101, 153).

4. Act as adviser to the Star for his lifetime for $40,000.00 payable at the rate of $100.00 per week (R. 100, 147, 154). Carter agreed to cause the Star so to retain Martin in that capacity (R. 100, 147, 153).

The agreement recited that the Star was a party in order to evidence its assent and to the end that the agreement should be "binding upon it in respect to any obligation or duty requiring performance on its part to consummate the same" (R. 93).

The initial $35,000.00 was paid and the required twenty-one judgment notes were executed by Star and Carter jointly and entered in judgment January 18, 1947 in the Superior Court of New Castle County, Delaware (R. 105, 110, 140, 161). Star, under the Carter management, paid the first five installments as they became due (R. 140, 161) but failed to pay the installment due August 1, 1949 (R. 94, 161).

and judgment thereon and as well judgment for $10,000.00 on a claim for that sum in income taxes refunded to the Star (R. 92-155). The defendants filed a motion to dismiss (R. 155). June 11, 1953 the Superior Court filed its opinion overruling defendants' contentions and denying their Motion to Dismiss (R. 153-160). The court held:

(a) The undisclosed principals, Bayard and Budner, may be sued on the 1946 contract though it was under seal (R. 155-156);

(b) The obligation of Star under the contract of 1946 upon which contract Martin relies was, contrary to defendants' contention, not merged into the judgments against Star obtained on the note securing payments provided for under the contract and "judgment obtained on a note given as collateral will not bar an action on the original debt" (R. 157-158);

(c) That the allegations are sufficient to support the theory of anticipatory breach and the claim for refund of taxes as against the motion to dismiss (R. 159-160).

There was no appeal from this decision. A counterclaim (not included in this record) was filed by petitioners and this case awaits trial (R. 162).

Instant Proceedings in Equity.

On April 7, 1953, the three defendants in No. 320, *supra*, the Star, Bayard and Budner, plus Ross, the agent for the latter two, filed a complaint in the Chancery Court. The complaint alleged that "Bayard and Budner as undisclosed principals thereby [i. e., the 1949 agreement of Ross] assumed the balance of Carter's obligation to Martin under the 1946 agreement" but that the 1949 agreement was induced by fraud and misrepresentations of Martin (R. 7).

The complaint further alleged that in the pending action (No. 320) in Superior Court by Martin against Bayard,

Budner and Star, they will have the opportunity to present arguments on Martin's claim and as well in support of their defense based on Martin's alleged fraud[3] (R. 9).

The complaint concluded that unless Martin be restrained from execution on the judgments until determination in the Superior Court action of the validity of the obligation of the plaintiffs, they are threatened with irreparable injury and loss (R. 9). The prayer was for temporary restraining order and for preliminary injunction restraining Martin from proceeding on the execution or collection of the obligations represented by Star's judgments except in the pending action at law in No. 320. The plaintiffs also prayed damages as an incident to the equitable relief (R. 10).

April 8, 1953 the Chancery Court entered its temporary restraining order and rule to show cause why preliminary injunction should not issue (R. 10, 13). On affidavits and after hearing, the Chancery Court filed its opinion July 15, 1953 (R. 144). It concluded:

1. That the plaintiffs had failed to show reasonable probability of establishing the fraud of Martin in his action against them (R. 143-144) or irreparable injury (R. 144). It held:

> "It is admitted by plaintiffs that they can readily pay the amount of these judgments. There would therefore be no embarrassment to them which might be caused by a sale of any of their assets. There is no assertion of insolvency on thepart of defendants. I do not therefore see how any irreparable injury could ensue to either of the parties."

Accordingly the Chancery Court entered its order denying preliminary injunction and dissolving the temporary restraining order (R. 144-145).

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[3] The complaint noted that in Nos. 492 and 493 the order of the Superior Court denying Star's Motion to Vacate the judgments had been affirmed by the Supreme Court of Delaware on the ground that Star was not injured by any fraud in connection with the 1949 agreement of Ross, Bayard and Budner.

On appeal, the Supreme Court of Delaware affirmed in an opinion holding (R. 160-171):

1. There is no threat of irreparable injury. The remedy at law is adequate (R. 166-168).
2. There is no basis for plaintiffs' assertion that Star is a mere accommodation endorser.

It referred to its prior opinion in (*Star Publishing Co.* v. *Martin*, 95 A. 2d 835) Nos. 492 and 493 affirming the trial court's holding that Star received valuable consideration under the terms of the 1946 contract (R. 169). It concluded with statement of the general rule that the simple assertion of a counter-obligation does not call for equity intervention to halt an execution (R. 169-170).

TARDY EFFORTS TO INJECT FEDERAL QUESTION

Petition for Re-argument was timely filed by petitioners on December 11, 1953 (R. 171-178). It merely concludes:

> "If Delaware courts are powerless to prohibit this shocking abuse of the judicial process, then constitutional 'due process' and an orderly system of law are dead, syllogism and semantics notwithstanding."

This petition was denied December 21, 1953 (R. 178).

Petitioners sought to inject a federal question by filing on December 23, 1953 Motion for Leave to File an Amended Form of Petition for Re-argument (R. 181). It sought to amend the already denied Petition for Re-argument so as to allege that the "opinion" of the Supreme Court of Delaware amounts in law to:

A denial of due process under the Fourteenth Amendment in allegedly finding Star was not intended to be a surety in the 1946 and 1949 transactions because such finding is not supported by the substantial evidence in the record (R. 181-182).

A denial of equal protection of law under the Fourteenth Amendment because it applies to appellants a rule different

from the statement in *Staats* v. *Herbert*, 4 Del. Ch. 508, 517-519, that it is the duty of the Chancery Court "to restrain a judgment creditor from using a judgment contrary to its real design (R. 181-182).

Leave to file was denied by the Supreme Court of Delaware January 13, 1954 (R. 199).[4]

The petitioners renewed their effort to inject a federal question by Motion for Certification of the Delaware Supreme Court that the alleged federal questions had been raised in their petition for re-argument and motion for special mandate filed December 23, 1953 (R. 193-194). This motion was denied January 26, 1954 (R. 195-196).

ARGUMENT

The petition fails to show any basis for invoking this court's jurisdiction under the statute relied upon. It is merely an effort to convert what is at most mere error of the state court into a federal question.

Apparently[5] petitioners' contentions are:

1. That the Supreme Court of Delaware in its opinion of December 11, 1953 for the first time held the Star to be a principal obligor on the 1946 contract with Martin. Because this is allegedly based on a finding of fact completely without evidence to support it, it therefore denies them due process (Petition, pp. 2-3). Apparently petitioners assume that Star's liability on the collateral judgment notes necessarily excludes liability as principal obligor (Pet., pp. 9, 12-13, 15).

2. That the opinion of the Delaware court departs from prior Delaware decisions as to:

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[4] The court in the same order denied petitioners' renewed motion for a special mandate (R. 178, 183) based on the theory that the court had not in fact made the criticized finding because for it to do so would be unconstitutional (R. 179).

[5] Uncertainty as to petitioners' contentions is a burden under which they have long labored. *Star Publishing Co.* v. *Martin*, 95 A. 2d 835, 838 R. 168.

Agreement of October 12, 1949 with Ross, as Agent for Bayard and Budner.

On October 12, 1949, Carter, finding Star in financial difficulties, entered into agreement to sell to Ross, later discovered to have been acting as agent for Bayard and Budner, 87.5% of the outstanding stock of Star, all of which was owned by Carter (R. 140). Ross, as agent for the same undisclosed principals, also entered into agreement with Martin reciting that Martin had agreed to release Carter from the 1946 agreement "upon Ross agreeing to assume the obligations thereunder." Ross, in consideration of such release, agreed to execute judgment notes in favor of Martin in the number and amount of those executed by Carter then remaining unpaid "subject to the same terms and conditions" (R. 106). Ross executed these notes but they were never entered as judgments (R. 154).

Martin in turn executed the release to Carter of all obligations to Martin including the liability on the series of judgments entered against Carter and Star on their notes, but reserving his rights against Star on the judgments (R. 106-107). The Star in consideration of the release by Carter of a claim against it for $19,362 agreed to Martin's release of Carter and that such release should not release Star (R. 107-108).

Thereafter Bayard and Budner assumed management of Star but the August 1951 and February 1952 payments fell in default (R. 89, 141).

Proceedings at Law.

Nos. 492 and 493—1947 Term: Star's Motion to Vacate Judgments.—On March 24, 1952 Martin caused execution to issue against Star on the two judgments then in default, Nos. 492 and 493 (R. 8, 111, 141). The Star on March 31, 1952 filed a motion in Nos. 492 and 493 to open and vacate the judgments against it praying that the executions be

stayed on the grounds, *inter alia,* that the judgments had been obtained by fraud and entry of the judgments was a fraud upon the court (R. 141). Martin moved to dismiss (R. 148).

On November 5, 1952 after a hearing on depositions and affidavits the Superior Court filed its opinion on the Star's motion (R. 147-152). The court held bad the Star's contentions that there was no consideration moving to it for the notes and that they had been invalidly executed. Finally, it held that there had been no fraud by Martin either at the time of the original agreement with Carter and Star in 1946 or at the time of the sale by Carter to Ross, as agent, in 1949 (R. 147-152).

On March 26, 1953 the Supreme Court of Delaware affirmed in an opinion not included in this record.[2] *Star Publishing Co.* v. *Martin,* 95 A. 2d 835.

No. 320—1952 Term: Martin's Action for Anticipatory Breach of Contract and Defendant's Motion to Dismiss.— On April 18, 1952 shortly after the filing of Star's motion to vacate the judgments, Martin in a new action filed a complaint against the Star, Bayard and Budner in the same Superior Court for New Castle County on the theory of anticipatory breach of their contracts (R. 85). It alleged breach by the Star of its contract dated October 3, 1946 (R. 91). It also alleged that by virtue of the agreement and judgment notes executed October 12, 1949 by Ross (R. 105-106) the individual defendants, Bayard and Budner, his principals, assumed all of the obligations of Carter under the original agreement of 1946 (R. 91) and had breached that agreement (R. 91-92). The prayer was for acceleration of the remaining installments of $54,000.00

[2] The Supreme Court of Delaware had earlier filed an opinion in that case on March 5, 1953 denying the Star's motion to remand for the taking of newly discovered evidence (*Star Publishing Co.* v. *Martin,* 95 A. 2d 465, 470 (1953)). This opinion is not in the record.

(a) Basis for issuance of preliminary injunction (Pet., pp. 2-4).

(b) Right to injunction against execution on a law judgment beyond its intended purpose as stated in *Staats* v. *Herbert,* supra.

I. No Federal Question is Presented.

Taking the aspect most favorable to petitioners,[6] it is clear that at most petitioners allege mere error by the Supreme Court of Delaware as to matters involving no federal question because purely of state cognizance.

If immunity from judicial error were within the protection of the Fourteenth Amendment, every erroneous decision by a state court would come here as a constitutional question. This court has long held that the due process clause of the Constitution of the United States does not guarantee that the decisions of state courts shall be free from error. The mere fact that a state court has rendered an erroneous decision on a question of state law or has overruled or departed from principles or doctrines of previous decisions on which a party relied does not give rise to a claim under the due process clause of the Fourteenth Amendment. *Central Land Co.* v. *Laidley,* 159 U. S. 103, 110-112; *Tracy* v. *Ginzberg,* 205 U. S. 170, 177-178; *McDonald* v. *Oregon Navigation Co.,* 233 U. S. 665, 669; *Dunbar* v. *City of New York,* 251 U. S. 516, 519; *Tidal Oil Co.* v. *Flanagan,* 263 U. S. 444, 450; *American Ry. Express Co.* v. *Kentucky,* 273 U. S. 269, 273; *Gryger* v. *Burke,* 334 U. S. 728, 731.

Neither does the equal protection clause assure uniformity of state judicial decisions. *Milwaukee Electric Ry. Co.* v. *Milwaukee,* 252 U. S. 100, 106. See *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673, 680. These decisions clearly dispose of the petitioners' contention based on alleged

[6] We, of course, do not concede inadequacy of evidence or departure from the prior course of decisions.

departure by the Delaware Supreme Court from its prior decisions.

Petitioners' contention that this court should review the record to ascertain whether it contains facts supporting the conclusion that Star is a principal obligor and more than a "mere accommodation endorser" (Pet. 2, 15) meets a number of difficulties:

First, the opinion of the Supreme Court of Delaware does not in terms hold that as a matter of law Star is a principal obligor. It merely holds that Star was something more than a "mere accommodation endorser" (R. 168). The judgment of the court does not necessarily involve a holding that Star is a principal obligor on the contract.

Secondly, the petitioners' contention is apparently posited on the invalid proposition that liability of the Star as collateral judgment debtor excludes liability on the principal obligation so secured (Pet. 2-3, 9, 15). That Star was obligated on the contract as well as on the collateral notes and judgments was evidenced by its signature thereto (R. 92, 101) supported by Martin's promises in its favor. The Superior Court earlier so found in the proceeding on the motion to dismiss Martin's action on the contract (R. 153, 157-158).

In any event, the decision of a state court upon a question of fact ordinarily will not be made the subject of inquiry by this court. *Portland Ry. Co.* v. *Oregon R.R. Comm.*, 229 U. S. 397, 411; *Miedreich* v. *Lauenstein*, 232 U. S. 236, 243.

Neither does this case come within the exceptions that this court will review the findings of fact of a state court where a federal right has been denied as a result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make

it necessary to analyze the facts in order to pass upon the federal question. The cases cited by petitioners (Pet., p. 15) establish these exceptions but afford no help to petitioners.

Here no federal question was urged before either the trial court or the Supreme Court of Delaware. Manifestly, no federal right was denied as a result of any finding; neither was there any conclusion in respect of a federal right. None had been suggested in any Delaware court; *a fortiorari,* there was no conclusion in respect of a federal right and a finding so intermingled as to make it necessary to consider the latter in order to pass upon the former. The cases cited by petitioners (Pet., p. 15) are therefore inapplicable. *Aetna Life Ins. Co.* v. *Dunken,* 266 U. S. 389, 394; *Grayson* v. *Harris,* 267 U. S. 352, 357-358.

II. The Decision Below Rests on a Non-Federal Ground Adequate to Support It.

The Delaware Supreme Court held that there was no basis for equity jurisdiction because the remedy at law was adequate. It stated the test to be:

> "What injury then is here threatened which cannot be assessed so accurately or cured so completely in the Superior Court as in the Court of Chancery." (R. 166)

It concluded that there

> "has not even been a shadow of a showing that Martin is unable to respond in damages"

if the petitioners should successfully sustain the allegations of their offsetting counterclaim based on fraud (R. 168).

The judgment is thus supported by an adequate non-federal ground of decision. *McCoy* v. *Shaw,* 277 U. S. 302, 303.

III. The Federal Question Was Not Timely Raised.

Even if it be assumed that a substantial federal question was first brought into the case by the decision of the Supreme Court of Delaware, it will not be considered here. Petitioners failed to advance the question at the earliest opportunity.

Even if the judgment here attacked be assumed *arguendo* to include, as petitioners contend, a holding that Star is a principal debtor, they cannot here avail of the "surprise" exception to the rule barring consideration of federal questions first raised by petition for re-hearing (*Ohio* v. *Akron Park District*, 281 U. S. 74, 79; *Wilson* v. *Cook*, 327 U. S. 474, 485 note). Obviously, the Petition for Re-argument filed December 11, 1953 (R. 171) afforded petitioners opportunity after notice of the holding of the Supreme Court of Delaware to advance the federal questions here urged. But no federal question was there raised and petitioners thus plainly failed to raise the federal question at the earliest opportunity. The Motion for Leave to File an Amended Form of Petition for Re-argument (R. 181-182) having been denied by the Supreme Court of Delaware (R. 192) is no more timely than a second petition for rehearing, and of no more avail. It obviously comes too late. *Bilby* v. *Stewart*, 246 U. S. 255, 257.

CONCLUSION.

It is respectfully submitted that the petition for certiorari should be denied.

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